



July 24, 2020

Amber M. Rivers
Director
Office of Health Plan Standards and Compliance Assistance
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20201

Re: Proposed Updates to 2020 MHPAEA Self-Compliance Tool

Dear Ms. Rivers:

Thank you for the opportunity to submit comments and recommendations on the proposed updates to the U.S. Department of Labor's (DOL) MHPAEA Self-Compliance Tool. The Kennedy Forum was founded by former Congressman Patrick J. Kennedy, author of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (Federal Parity Act), in 2014 and is focused on improving the lives of individuals living with mental health and substance use conditions and promoting health equity for all.

The Kennedy Forum supports incorporating recent guidance and compliance examples into the Self-Compliance Tool. These additions will improve consistency across DOL materials on non-quantitative treatment limitations (NQTLs) and aid compliance and enforcement with the Federal Parity Act.

The Kennedy Forum also supports the addition of a new section on establishing a compliance plan (Section H). Without an internal compliance plan, it is virtually impossible for an issuer or plan to meet the Federal Parity Act's requirements. Yet, while we applaud DOL for highlighting the importance of an internal compliance plan in its proposed revisions, **we believe that Section H as currently constituted is insufficient to help an issuer or plan to create an internal compliance plan that ensures compliance with the Federal Parity Act.**

Furthermore, we strongly urge DOL not to include a reference to the National Association of Insurance Commissioner's Market Conduct template. The NAIC template fails to identify many NQTLs, lacks measures for testing compliance with every aspect of the federal NQTL rule, and is less robust than many parity tools used by states across the country. Indeed, the DOL Self-Compliance Tool is a superior tool to the NAIC template. Referencing the NAIC tool within the Self-Compliance tool will create confusion and significantly hinder efforts across the country to ensure compliance with the Federal Parity Act.

The Kennedy Forum offers the following specific comments and recommendations on the proposed revisions to the Self-Compliance Tool.

Support for Addition of Recent Guidance and Compliance Examples

The Kennedy Forum strongly supports the addition of recent guidance and compliance examples within the Self-Compliance Tool. In particular, we applaud the additions on impermissibly limiting reimbursement of room and board (pg. 11), tying opioid use disorder treatment to participation in psychosocial supports (pg. 11), and excluding eating disorder treatment (pg. 12). We also support the notes on reimbursement rates (pg. 22) and the compliance tip on the need evaluate how an NQTL operates in practice (pg. 28).

The Kennedy Forum also supports the additional language noting that an issuer or plan's compliance with the Federal Parity Act does not necessarily imply compliance with other federal requirements, such as Part 4 of ERISA, as well as the requirement to keep plan directories up-to-date, accurate, and complete (pg. 33).

Recommended Changes

Employing Evidentiary Standards

On page 25, DOL proposed a new note that starts, "Plans and issuers have flexibility in determining the sources of factors to apply to NQTLs (including whether or not to employ evidentiary standards), as long as they are applied comparably and no more stringently to MH/SUD benefits than to medical/surgical benefits." The Kennedy Forum agrees with comments of the Legal Action Center that this statement is problematic, because an evidentiary standard must necessarily be used when an issuer or plan decides to apply a factor. As Legal Action Center rightly points out, DOL's own example in the same paragraph is essentially meaningless without some evidentiary standard. Lacking an evidentiary standard to operationalize a factor, a plan would have no basis for how to apply the factor. Again, as the Legal Action Center notes, existing Self-Compliance Tool language on page 26 stipulates that, "if high cost is identified as a factor used in designing a prior authorization requirement, the threshold dollar amount at which prior authorization will be required for any service should also be identified." This language is inconsistent with the proposed revisions on page 25, which we respectfully suggest be removed.

Reimbursement Rate Setting Using Medicare

The Kennedy Forum welcomes new Self-Compliance Tool content on reimbursement rates. DOL is correct to note the importance of Medicare rates as a common evidentiary standard that issuers and plans use in setting rates. However, Medicare rates have important limitations that DOL should make explicit in the Self-Compliance Tool. Most obviously, because Medicare is not subject to the Federal Parity Act and does not cover all mental health and substance use disorder provider types (e.g. marriage and family therapists) or the full continuum of services

(e.g., residential treatment), Medicare as a benchmark does not provide useful information for these services. To rectify the limitations of Medicare rates, DOL should add additional guidance that plans must examine data for the all covered mental health and substance use disorder services.

Section H – MHPAEA Compliance Plan

As noted previously, The Kennedy Forum generally supports the idea of adding language on MHPAEA compliance plans. Without a compliance plan – indeed, without a fully developed compliance *program* – it is virtually impossible for an issuer or plan to be in compliance with the Federal Parity Act. Therefore, the Kennedy Forum urges the deletion of “[a]lthough not required by MHPAEA” at the beginning of Section H (pg. 34).

We also urge DOL to strengthen language on the need to provide training and education to a wide range of individuals who are essential to determining whether a plan or issuer is compliant with the Federal Parity Act both in writing and in operation. The Kennedy Forum supports the Legal Action Center’s suggested language:

Successful compliance programs provide on-going training and education to all the individuals responsible for ensuring parity compliance, including those who develop plan design and monitor compliance, communicate with current and prospective plan members and providers about benefit coverage, utilization management, network providers, and reimbursement, and are responsible for making decisions related to both MH/SUD and medical/surgical benefits on behalf of the plan or issuer (such as claims reviewers at all levels of internal review and grievances, and medical practitioners involved in benefit decisions). Documentation of training and education programs should include information on the frequency of training and familiarity with Parity Act standards.

Furthermore, training is not enough. Issuers and plans must have systems in place to determine Federal Parity Act compliance. While The Kennedy Forum welcomes language on the importance of auditing adverse benefit determinations, audits are also necessary on the application of all NQTLs. We again support the Legal Action Center’s suggested revision:

A plan or issuer must monitor and conduct an internal review for potential non-compliance on an on-going basis and prior to any change in benefit design and identification of problem areas with MHPAEA. Plans that delegate management of mental health and substance use disorder benefits and/or pharmacy benefits to another entity, must have clear protocols regarding the continual and mutual sharing of medical/surgical and mental health and substance use disorder plan information and implement a regular audit mechanism to ensure compliance. A plan or issuer must audit samples of adverse benefit determinations, to assess the application of medical necessity criteria, the level of detail provided to claimants regarding the basis for service denials, and correctness of determinations. A plan or issuer must also audit the

application of all NQTLs, including outcome measures that reflect the application of utilization management requirements, provider network admission and adequacy standards, and reimbursement rate setting practices.

Finally, as noted above, The Kennedy Forum strongly believes that DOL should remove reference to the NAIC NQTL template. Unfortunately, the NAIC tool lacks key NQTLs, including:

- standards for network admission;
- reimbursement rate setting and methods for determining usual and customary rates and reasonable charges;
- scope of services; and
- network adequacy.

Furthermore, the NAIC tool does not require issuers or plans to analyze all the essential components of the federal NQTL rule, potentially resulting in the illusion of compliance. The Kennedy Forum believes having DOL, a federal regulator charged with Federal Parity Act enforcement, reference the NAIC tool within its own, much stronger Self-Compliance Tool is contradictory and confusing. We urge DOL to remove the reference to the NAIC tool within the Self-Compliance Tool.

Thank you for the opportunity to provide comments. Please do not hesitate to contact me at david@thekennedyforum.org with any questions.

Sincerely,

A handwritten signature in blue ink that reads "David Lloyd". The signature is written in a cursive, flowing style.

David Lloyd
Senior Policy Advisor